6

Rec'd. files 27 Dec 1848

SUPREME COURT OF THE UNITED STATES.

No. ~~236~~. 152. 72 49. 46.
11 46. 45, 81

WILLIAM H. GAINES AND MARIA, HIS WIFE, ALBERT BELDING, HENRY BELDING AND GEORGE BELDING,
COMPLAINANTS AND APPELLANTS.

vs.

THE HON. JACOB THOMPSON, SECRETARY OF THE INTERIOR, AND THE HON. JOSEPH S. WILSON, COMMISSIONER OF THE LAND OFFICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

CCXXXVI. GIDEON, Printer, 511 Ninth Street, D. C.

ﻣﻜﺘﺒﺔ ﺍﻟﺪﻛﺘﻮﺭ ﻓﺆﺍﺩ ﺍﻟﺼﻔﺎ

SUPREME COURT OF THE UNITED STATES,
No. 236.

WILLIAM H. GAINES AND MARIA, HIS WIFE, ALBERT BELDING, HENRY BELDING AND GEORGE BELDING,
COMPLAINANTS AND APPELLANTS.

vs.

THE HON. JACOB THOMPSON, SECRETARY OF THE INTERIOR, AND THE HON. JOSEPH S. WILSON, COMMISSIONER OF THE LAND OFFICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX.

	PAGE. Original.	Print.
Style of Court	1	1
Parties	2	1
Bill of Complaint	2	1
Exhibit A	13	5
" B	17	6
" C	20	7
" D	21	8
Order of Judge	27	10
Notice of Motion for Injunction	27	10
Marshal's Return	29	11
Plea of Hon. Jos. S. Wilson	29	11
Order of Court dismissing Bill	32	12
Appeal prayed and granted	32	12
Appeal Bond	32	12
Order that Record be sent to Supreme Court.	35	13
Clerk's Certificate and Seal	35	13

DISTRICT OF COLUMBIA, to wit:

At a Circuit Court of the District of Columbia begun and held in and for the county of Washington, at the city of Washington, on the first Monday of October, being the fifteenth day of the same month, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fifth.

Present,

Hon. JAMES DUNLAP, *Chief Judge.*
Hon. JAS. S. MORSELL, } *Assistant Judges.*
Hon. WM. M. MERRICK, }
WILLIAM SELDEN, ESQ., *Marshal.*
JOHN A. SMITH, *Clerk.*

In the record of the proceedings of the said Court, amongst others, are the following, to wit:

WILLIAM H. GAINES, and MARIA, his wife, ALBERT BELDING, HENRY BELDING, GEORGE BELDING, Complainants,
against
The Hon. JACOB THOMPSON, Secretary of the Interior, the Hon. JOSEPH S. WILSON, Commissioner of the Land Officers.

Be it remembered, that heretofore, to wit, on the second day of July in the year of our Lord one thousand eight hundred and sixty, the said complainants, by Robert J. Brent, Esquire, their solicitor, filed in Court their bill of complaint, with the accompanying exhibits and the order of Judge Merrick thereon, against the said defendants, in the words and figures following, to wit:

To the Honorable the Judges of the Circuit Court of the District of Columbia for Washington county, in equity.

The bill of complaint of William H. Gaines, Maria, his wife, Albert Belding, Henry Belding and George Belding, respectfully showeth unto your Honors, that your orators, except William H. Gaines, are the children and heirs at law of Ludovicus Belding, deceased, late of the State of Arkansas.

That as such heirs at law they have succeeded to all the title vested in the said Ludovicus Belding, in his lifetime, of, in and to a certain tract of land situated in the State of Arkansas, embracing the "Hot Springs," and now known in the government surveys as the south-west quarter of Section thirty-three, town-

ship two, south of Range nineteen west, containing one hundred and sixty acres.

That prior to the 29th day of May, 1830, the said Ludovicus Belding was a settler or occupant of the above described tract of land, which was then public land belonging to the government of the United States, and the said Ludovicus Belding was on said 29th day of May, 1830, in possession of said tract of land and cultivated part thereof in the year 1829.

Your orators further show, that said tract of land on said 29th day of May, 1830, had not been reserved for the use of the United States, or either of the several States in which any of the public lands were situated, nor had said tract of land been reserved from sale by Act of Congress or by order of the President, or appropriated for any purpose whatever.

Your orators further show, that the said Ludovicus Belding was unable to enter the said tract of land within the term of one year from the said 29th day of May, 1830, because the said land had not been surveyed and certified by the Surveyor General until the 30th day of April, 1838.

That, notwithstanding the expiration of the Act of Congress, approved on the 29th day of May, 1830, entitled "An Act to grant pre-emption rights to settlers on the public lands," Ch. 208, Congress afterwards revived, confirmed and protected the rights of all occupants and settlers upon the public lands of the United States who were entitled to a pre-emption, according to the provisions of the aforesaid recited Act of Congress, approved on the 29th May, 1830, subject to certain qualifications and conditions, as will fully appear by reference to the Act of Congress, approved on the 14 July, 1832, Ch., 246, entitled "An Act supplemental to the Act granting the right of pre-emption to settlers on the public lands, approved the 29th day of May, 1830.

And your orators are advised and expressly charge that, by reason of said last Act of Congress, the right and title of said Ludovicus Belding was revived, confirmed and protected, subject to the terms and conditions of said last Act of Congress, because the said Ludovicus Belding was not enabled to make proof and enter said tract of land within the time limited in said Act of Congress, approved on the 29th day of May, 1830, in consequence of the public survey thereof not having been made and returned until the 20th day of May, 1838, the said Ludovicus Belding having departed this life in the year 1833.

Your orators further show, that within one year after the survey of said tract of land was made, and before any lands in said township were offered for sale, proof of the settlement and improvement of said tract of land by said Ludovicus Belding, in his lifetime, was made to the satisfaction of the Register and Receiver of the land district in which such lands were situated, agreeably to the rules prescribed by the Commissioner of the

General Land Office for that purpose, and at the same time, that is to say, on the 10th day of March, 1839, a tender was made to the proper Land Officer, in behalf of the heirs of said Ludovicus Belding, of the sum of two hundred dollars in gold and silver coin, as and for the purchase money due therefor to the government.

Your orators further show, that upon the exhibition of such proof and upon such tender, such proceedings were had, that on the 25th November, 1851, the Commissioner of the General Land Office, in pursuance of instructions from the Honorable the Secretary of the Interior, instructed the Register and Receiver at the Land Office at Washington in the State of Arkansas to permit your orators, as the heirs of said Ludovicus Belding, to make payment for the said south-west quarter of Section thirty-three, township two, south of range nineteen west, as will more fully appear by reference to a copy of such proceedings herewith filed marked "Exhibit A." (copied on page 18), and prayed to be taken as part hereof.

That in pursuance of said instructions your orators, on the 19th December, 1851, made the entry No. 6545 in the Land Office, at Washington, Arkansas, a copy of which, marked "Exhibit B." (copied on page 17), is herewith filed and prayed to be taken as part hereof, and on the same day your orators paid to the Receiver two hundred dollars in full of the purchase money due to the government for said tract of land, as more fully appears by reference to a copy of the Receiver's receipt herewith exhibited, marked "Exhibit C." (copied on page 70) and prayed to be taken as part hereof.

Your orators further show, that prior to the death of said Belding, and while he possessed the said tract of land under his said pre-emption claim, he expended several thousand dollars in building on and improving the said land.

Your orators further show, that since the entry of said tract of land by them as aforesaid, they have expended large sums of money, not less than ten thousand dollars, in building on and improving said tract of land, and they have paid State and County taxes thereon, relying on the good faith of the government and the equitable title vested in them as aforesaid.

Your orators further show, that they, as well as the said Ludovicus Belding, have in all things complied with the conditions and requirements of law in the premises, and are in no default whatever; that after a protracted litigation with private claimants your orators have finally obtained a judgment of the highest State Court of Arkansas for the recovery of such portions of said tract of land as are not possessed by them, which judgment was affirmed by the Supreme Court of the United States at December Term, 1859.

That your orators, having this equitable title and being in

possession of part of said tract of land, applied to the Honorable, the Commissioner of the Land Office, for a patent, but the same has not only been wrongfully refused but their entry of said land has been illegally and oppressively ordered to be cancelled, as will appear by reference to a copy of the decision of Hon. Jacob Thompson, Secretary of the Interior Department, herewith filed, marked "Exhibit D." (copied on page 21), and prayed to be taken as part of this bill of complaint.

Your orators are advised and charge, that the pretext set up in said decision, touching the reservation, in the Act of Congress of 20 April, 1832, is wholly unfounded and untenable.

Your orators charge, that great and irreparable damage will be inflicted on your orators by depriving them of their possessory rights and equitable title in the premises, unless your Honors will restrain the impending action of the Commissioner of the Land Office under the decision aforesaid. Wherefore, and inasmuch as your orators are remediless at and by the strict rules of common law and can only have adequate relief in a Court of Equity, and to the end that the Hon. Jacob Thompson, Secretary of the Interior, and the Hon. Joseph S. Wilson, Commissioner of the Land Office, may answer this bill of complaint and the allegations thereof particularly and fully, and that your Honors may pass an order enjoining and restraining the said Thompson and the said Wilson, and each of them, from cancelling or causing or permitting to be cancelled or unpaid, the *entry* of said tract of land so as aforesaid made by your orators, until the further order of this Court, and that your orators may have such other and further relief as may be right and proper.

May it please your Honors to grant unto your orators the United States writ of injunction, restraining and enjoining the Hon. Jacob Thompson, Secretary of the Interior, and the Hon. Joseph S. Wilson, Commissioner of the Land Office, from causing or permitting the entry made by your orators of the said tract of land to be cancelled, released or impaired until the further order of this Court, also to grant the writ of subpœna commanding the said Jacob Thompson and Joseph S. Wilson (who are prayed to be made defendants hereto) to answer this bill of complaint without delay and by a day therein named and as in duty, &c.

ROBERT J. BRENT,
for Complainant.

District of Columbia, } to wit.
Washington County, }

Before the subscriber, a Justice of the Peace in and for said county, personally appears W. H. Gaines, one of the above complainants, and made oath on the Holy Evangely of Almighty God, that the facts above stated are true to the best of his knowledge and belief,

July 2d, 1860. GILBERT L. GIBERSON, *J. P.*

Exhibit A.

Register's Transcript.

General Land Office,
November 25th, 1851.

Gentlemen:—The papers accompanying your letters of the 18th and 24th March last, in reference to the claims to the Hot Springs in Arkansas, having been submitted to the Secretary of the Interior, for his action on the legal point in the case, to wit, the reservation of the land by Act of Congress, they were returned to this office for its decision on the respective merits of the pre-emption claims, irrespective of this question.

On the 26th August last, this office returned the papers with its decision adverse to the claim of the heirs of John Percifull, and in favor of that of the heirs of Ludovicus Belding, it agreeing with you, both as to the establishment of the facts of cultivation in 1829, and possession on the 29th of May, 1830, and regarding the objections of the receiver, founded upon the opinion that those acts were performed as the tenant of another, as not affecting the validity of the claim.

On the 14th ult., this Office received the opinion and decision of the Secretary of the Interior, dated the 10th of that month, in which he sustains the existing validity of the Act of 20th April, 1832, it not having been affected or repealed by any subsequent law, and that, therefore, none of the claims preferred for this land are of any legality.

On the said 14th ult., an application was made by the attorney of the heirs of Belding, for permission to make an entry of said claim, in order that they may be placed in a proper position for the assertion of their rights hereafter in the Courts stating that, of course, under the decision of the Secretary, they should not ask for a patent.

This was refused by this Office, and an appeal from that action taken to the Secretary of the Interior, who, on the 21st inst., addressed to this Office a letter, a copy of which is herewith enclosed.

In accordance with the directions of the Secretary therein contained, you are instructed to permit the heirs of Ludovicus Belding, to make payment for the southwest *quarter* of section thirty-three, T. 2, S. R. 19 W., containing one hundred and sixty acres, and in addition to the ordinary entry thereof upon your books, and the return to this Office, you will note the fact of its interference with the New Madrid location of Langlois, of its embracing land directed to be reserved by the Act of 20 April, 1832, and that said entry is permitted under the Secretary's decision of the 21st November, 1851.

Similar annotations will be made on the receiver's receipt and the register's certificate.

Respectfully, your obedient servant,

J. BUTTERFIELD,
Commissioner.

Department of the Interior,
November 21st, 1851.

Sir:—Upon consultation with the Attorney-General, and after full consideration of the application of A. H. Lawrence, Esq., attorney for the heirs of Ludovicus Belding, one of the claimants to the Hot Springs of Arkansas, on appeal from your decision of the 15th ultimo, against permitting said heirs to make an entry under the Act of 29th May, 1830, and 14th July, 1832, I have concluded that it will be proper and in accordance with precedent, to permit them to do so, and you will therefore instruct the register and receiver accordingly.

Said entry will remain subject to the same power of revision and control by the General Land Office and this department, and may be lawfully exercised over any ordinary entry.

The government will still hold the ultimate power of protecting its own rights, while the claimants will be merely placed in a position to contest the adverse claims of others to the same land.

I am Sir, very respectfully,
Your obedient servant,

ALEX. H. H. STUART,
Secretary.

To the Commissioner of the General Land Office.

Exhibit B.

No. 6245.

Land Office, Washington,
Arkansas, Dec. 19, 1851.

We, Maria Gaines, wife of William H. Gaines, late Maria Belding, Albert Belding, Henry Belding, and George Belding, heirs of Ludovicus Belding, deceased, of Hot Springs County, Arkansas, do hereby apply to purchase the southwest quarter of section thirty-three (33), in township two (2) south, of range nineteen (19) west, containing one hundred and sixty (160) acres, for which we have agreed with the register, acting under instructions from the Commissioner of the General Land Office, bearing

date 25th Nov., 1851, to give at the rate of one dollar and twenty-five cents per acre.

A. BELDING,
MARIA GAINES,
HENRY BELDING,
GEORGE BELDING.

I, William H. Etter, Register of the Land Office at Washington, Arkansas, do hereby certify, that the tract above-mentioned is sold, as containing one hundred and sixty acres, as mentioned above, and the price agreed upon is one dollar and twenty-five cents per acre.

WM. H. ETTER,
Register.

Note.—In accordance with the instruction, I note the interference of this entry with the New Madrid location of Langlois, of its embracing land directed to be reserved by Act of 20th of April, 1832, and that the entry is permitted to be made, under the decision of the Secretary of the Interior of the 21st Nov., 1851, transmitted to this office by the Commissioner of the General Land Office, under date of 25th November, 1851.

WM. H. ETTER,
Register.

Register's Office, Washington, Arkansas,
January 19th, 1853.

I, William H. Etter, Register of the Land Office at Washington, Arkansas, do hereby certify, that the foregoing pages contain a true copy of the letters received from the Commissioner of the General Land Office, the application filed and the annotations on the tract book in this office under said instructions.

WM. H. ETTER,
Register.

Exhibit C.

No. 6545.

Receiver's Receipt.

Receiver's Office at Washington, Arkansas,
December 19th, 1851.

Received of Maria Gaines, (wife of William H. Gaines, formerly Maria Belding,) Albert Belding, Henry Belding, and George Belding, the heirs and legal representatives of Ludovicus Bel-

ding, deceased, of Hot Spring County, in the State of Arkansas, the sum of two hundred dollars, in full, for the southwest quarter of section thirty-three (33), in township two (2), south of range nineteen west, containing one hundred and sixty (160) acres, according to the return of the Surveyor-General, at one dollar and twenty-five cents per acre.

According to instructions, I note that this entry interferes with the New Madrid location of Francis Langlois on the same land, and also that it embraces land directed to be reserved by the Act of Congress of 20th of April, 1832, and is only permitted to be made under the decision of the Secretary of the Interior, under date of November 21, 1851, and the instructions of the Commissioner of the General Land Office, under date of 25th November, 1852, in accordance with said decision.

B. F. HEMPSTEAD.
Receiver.

Exhibit D.

Department of the Interior,
Washington, June 7, 1860.

SIR:—Herewith I return the papers submitted with your report of the 27th April last, and enclose the argument since filed in this Department, upon the application of the heirs of Ludovicus Belding, for a patent upon their entry of 19th December, 1851, by special certificate, No. 6545, of the southwest quarter of section thirty-three, township two, south of range nineteen west, Washington District, Arkansas, embracing the Hot Springs.

A controversy has been going on for many years before this Department, and recently in the Courts of Arkansas and the Supreme Court of the United States, in relation to the title to this tract of land. Rector and others claim under certain locations of a New Madrid certificate, and an alleged pre-emption right in the heirs of John Perciful, and Gaines and others, on the other hand, as heirs of Ludovicus Belding, and the latter are at present the applicants for a patent. Their entry was allowed under a special order of Secretary Stuart, dated November 21, 1851, made on a suggestion of Attorney-General Crittenden, (who, however, does not appear to have had the case before him regularly for his advice,) although the same Secretary had, under date of October 10th, 1851, in an elaborate opinion, decided against the recognition of all the claims that had then been set up, or are now before me, on the ground, that the quarter section in controversy had been reserved by the Act of Congress of 20th

April, 1832, and no right to the land had vested in any of the claimants prior to that reservation.

In 1854, the whole case was before Attorney-General Cushing, on the reference, by my predecessor, to him of an application by Rector, as assignee of Langlois, for a patent upon the location of the New Madrid certificate.

That Office, on the 20th August, 1854, pronounced an opinion sustaining Secretary Stuart's decision of October 10th, 1851, and condemning the subsequent allowance of an entry of the land by Belding's heirs. (See Opinions of the Attorney-General, Vol. 6, p. 697.) One point, however, in favor of Rector's claim, was reserved by Mr. Cushing, viz.: as to the validity of the James J. Conway survey of July 16th, 1820, but this survey has since been declared invalid and unauthorized by the Supreme Court of the United States, at the December Term, 1859, in the case of John C. Hale *vs.* W. H. Gaines and others.

Thus it is shown that all the claims of the contesting parties have been heretofore adjudged to be invalid, and that nothing has been declared by the Attorney-General or the Supreme Court, which is inconsistent with the decision of October 10th, 1851.

That decision appears rather to have been vindicated and sustained. On a review now of the questions involved in the case, I concur in the decision of Secretary Stuart. Moreover, I am of the opinion that this Department had no legal authority in 1851, to allow an entry of the land by the heirs of Belding, or any one else.

The issuance of Washington Certificate, No. 6545, was against law, and that certificate has no validity as against the United States, and should not have been allowed. By allowing it, this Department was placed in an attitude hostile to the Act of Congress of 20th April, 1832, which assumed that the land belonged to the United States, and forbade its entry, location or appropriation for any purpose, until some future disposal by the United States, that is, by authority of the National Legislature.

The counsel for Belding's heirs, on applying for the entry, in 1851, after Secretary Stuart's decision adverse to their right, said that "it was the question of reservation, which they wished to try in the courts." But in the litigation which has since arisen, this question was not in issue before the courts of Arkansas or of the United States; and I do not see how it can come in issue, and be decided by litigation between parties, neither of whom have a valid, though under the laws of Arkansas, one may have a right of possession in preference to others.

This case having been repeatedly brought before this department and fully considered, and the several claims to the land having been repeatedly rejected for reasons which have been concurred in by each succeeding head of this department through

a series of years, I think the time has now arrived, at which it is no longer proper to delay a vindication of the position of the department by appropriate action.

The entry of Belding's heirs should, therefore, now be cancelled, the invalidity of all the subsisting claims to this quarter section declared, and the land held subject to such disposal as Congress may see fit to direct, should be made of the same.

The request of the counsel for the heirs of Belding to withdraw their application after the same had been fully argued by them, and carefully examined by me cannot for the same reasons be received with favor and is overruled.

Very repectfully, your obedient servant,

J. THOMPSON,
Secretary.

The Commissioner of the General Land Office.

Order of Judge.

Let notice be given to respondents of complainant's intention to move the Court for an injunction in this case, on the third Monday of October next; July 2d, 1860.

WM. M. MERRICK, *A. J.*

Thereupon subpœnas issued as prayed against said defendants to August rules of said Court, and were regularly returned served, and the day of the filing the said bill in pursuance of the order of Judge Merrick the following notice of motion for the injunction issued to be served on the said defendants.

Notice of Motion for Injunction.

W. H. Gaines and wife, et al., Complainants,
vs.
Hon. Jacob Thompson, Secretary of the Interior, and Hon. Joseph S. Wilson, Commissioner of the Land Office.

In Circuit Court of the District of Columbia, for Washington County, in Equity.

To the Hon. Jacob Thompson, Secretary of the Interior, and Hon. Joseph S. Wilson, Commissioner of the Land Office,

Take notice that a bill of complaint has been filed in this Court against you by the above named complainants, and that upon the filing of said bill of complaint, the Hon. W. M. Merrick, Associate Justice of said Court has ordered that notice be

given to you and each of you of the complainant's intention to move the Court on the 3d Monday of October next, for a writ of injunction, restraining and enjoining you and each of you from causing or permitting to be cancelled, an entry, No. 6545, made by the within complainants, of a tract of land known on the government surveys as the southwest quarter of section thirty-three, township south of range nineteen west, Washington District, Arkansas, when you are notified to attend said Court for the hearing of said motion.

(Test.) JNO. A. SMITH,
Clerk.

Marshal's Return.

On the return of which the Marshal certifies that he had served the notice on the defendants by leaving with each a certified copy of said notice and said cause was regularly continued until the third Monday of October, and on the third Monday of October it was postponed until the twentieth day of October, when the said defendants appeared in court here by Henry Beard, Esquire, their solicitor, and the Hon. Joseph S. Wilson, the Commissioner in proper person; and they filed in court here the following plea, to wit:

Plea of Honorable Jos. S. Wilson.

"The plea of Joseph S. Wilson, Commisioner of the General Land Office, and one of the defendants to bill of complaint of William H. Gaines, et al., complainants."

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's said bill of complaint mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea saith that the executive is a co-ordinate branch of the government, under the Constitution of the United States. That the Secretary of the Interior is the head of that branch or department of the Executive, having charge and control of the public lands, and that he is invested by law, with final powers and jurisdiction over all claims or controversies concerning said lands so long as the title remains in the government.

That the decisions of the Secretary are final, there being no power authorized by law to review his decisions. That having decided a case and communicated his decision to this defendant as the Commissioner of the General Land Office, a bureau belonging to his department, this defendant is bound by law, and the obligations of his official oath to observe, respect and enforce said decision to the best of his judgment and ability.

That the Secretary having decided that the entry of Belding's heirs, No. 6545, should be cancelled, and having directed this defendant to carry out said decision, it is his duty to do so; and there is no lawful power in this honorable Court to restrain his official action therein.

That the acts and decisions of the Secretary, are the acts and decisions of the President, as has been settled both by judicial decisions and by the practice of the government, including the present administration.

And he respectfully submits that this honorable Court does not possess the lawful power or jurisdiction to review or restrain the official acts or decisions of the President or those of his executive officers. All of which matters and things this defendant doth aver to be true, and pleads the same to the whole of said bill, and humbly demands the judgment of this honorable court, whether he ought to be compelled to make answer to the said bill of complainant, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

JOS. S. WILSON.

October 13, 1860.

Order of Court Dismissing Bill.

Which plea being allowed to be filed by the Court, and the said cause coming on to be heard on bill, exhibits and plea, and being argued by counsel and mature deliberation being thereon had, it was ordered and decreed by the Court that said bill be dismissed, which was done accordingly.

Appeal Prayed and Granted.

Thereupon the complainants, by their solicitor aforesaid prays an appeal in open court from the decree of the Court aforesaid, so as aforesaid rendered, to the Supreme Court of the United States, and it is granted them; whereupon they file in Court here a certain writing obligatory, commonly called an appeal bond in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents, that we William H. Gaines and Charles S Wallach, are held and firmly bound unto the Hon. Jacob Thompson, Secretary of the Interior Department, and the Hon. Joseph S. Wilson, Commissioner of the Land Office, in the full and just sum of three hundred dollars, current money of the United States; to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally,

firmly by these presents, sealed with our seals, and dated this nineteenth day of October, eighteen hundred and sixty.

Whereas at the present term of the Circuit Court, sitting as a Court of Equity for the county of Washington, in the District of Columbia, in a cause wherein William H. Gaines and Maria Gaines, his wife, Albert Belding, Henry Belding and George Belding, heirs at law of Ludovicus Belding, deceased, were complainants, and the Hon. Jacob Thompson, Secretary of the Interior Department, and the Hon. Joseph S. Wilson, Comissioner of the Land Office, were defendants, a decree was rendered against the said complainants, and they having entered an appeal to the Supreme Court of the United States.

Now the condition of the above obligation is such, that if the said appellants shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

WM. H. GAINES, [SEAL.]
CHAS. S. WALLACH. [SEAL]

Signed, sealed and delivered in
the presence of
JNO. A. SMITH.

Approved by the Court.

Order that Record be Sent to Supreme Court.

Which being read and heard, and the said bond being by the Court approved of, it is, therefore, ordered by the Court here, that the record and proceedings aforesaid, in the plea aforesaid, with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same are transmitted to the said Court accordingly.

(Test.) JNO. A. SMITH,
Clerk.

Clerk's Certificate and Seal.

District of Columbia,
County of Washington. } to wit:

I, John A. Smith, Clerk of the Circuit Court of the District of Columbia, for the county of Washington, hereby certify that the aforegoing is a full, true and perfect transcript of the record of the proceedings had in said Court, in the case of William H.

Gaines and others against the Hon. Jacob Thompson, Secretary of the Interior, and the Hon. Joseph S. Wilson, Commissioner of the Land Office, taken from the record and minutes of said Court.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and affixed the public seal of said Court, this fifth day of November, A. D. 1860.

JNO. A. SMITH,
Clerk.

Supreme Court of the United States.

No. 9 ORIGINAL—DECEMBER TERM, 1867.

Ex parte JOSEPH H. BRADLEY.

PETITION FOR A MANDAMUS TO THE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The justices of the Supreme Court of the District of Columbia, for return to the rule upon them, in this case, to show cause why a mandamus should not issue, requiring them to restore the said Joseph H. Bradley to the office of an attorney of said court, respectfully make answer: that said rule ought to be discharged—

1. Because said Bradley was removed from the said office of attorney of said court only after due notice had been served upon him, and he had been heard in defense, and after mature consideration by the court. That said order of the court was a judgment of the court in regard to a matter within its own exclusive jurisdiction, and not subject to review in any other court; and especially not, in this form of proceeding.

The question as to the jurisdiction of the Supreme Court of the United States to reverse the judgment of an inferior court, in cases of this character, by mandamus, was decided in ex parte Secombe, 19 How., 9, and we beg leave to incorporate in this return several paragraphs of the opinion in that case, delivered by Ch. J. Taney:

"A mandamus," say the court, "has been moved by David A. Secombe, to be directed to the Judges of the Supreme Court of the

Territory of Minnesota, commanding them to vacate, and set aside an order of the said court, passed at January term, 1856, whereby the said Secombe was removed from his office as an attorney and counsellor of that court."

"In the case of Tillinghast *v.* Conkling, which came before this court at January term, 1829, a similar motion was overruled by this court. The case is not reported, but a brief written opinion remains on the files of the court; in which the court says, that the motion is overruled upon the ground that it had not jurisdiction in the case."

"The removal of the attorney and counsellor in that case took place in a district court of the United States, exercising the powers of a circuit court; and in a court of that character, the relations between the court and the attorneys, and counsellors who practice in it, and their respective rights, and duties are regulated by the common law. And it has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." * * * * * * * * * *

"The Court, it seems, were of opinion that no notice was necessary, and proceeded without it; and whether this decision was erroneous or not, yet it was made, in the exercise of judicial authority, where the subject was within their jurisdiction, and it cannot, therefore, be reversed in this form of proceeding." The opinion in this case was referred to, with approbation, by this court in the recent case, ex parte Garland, 4 Wallace, as we shall presently show.

If it be authority, it would seem to be conclusive, in the present case, and your respondents might rest their defense upon it alone.

But since this court has declared, on several occasions, that it would not grant a rule to show cause why a mandamus should not issue, except on a prima facie case, and the decisions, just referred to, are of recent date, and well known to the Court which made them, we are not at liberty to assume, as certain, that your Honors will regard them as applicable to the case now before you, or, if applicable, that they will be followed.

It is incumbent upon us, therefore, to go farther and show other cause why the present rule should be discharged:

On the 10th of August, 1867, Judge Fisher was holding a crimi-

nal court, and after reading a statement of facts in reference to the conduct of said Bradley towards the said Judge, in the progress of a trial which had then closed, and growing out of said trial, made an order that said Bradley should be dismissed from the bar of the Supreme Court of this District, when the following scene took place:

"MR. BRADLEY. Has the court adjourned yet?

"JUDGE FISHER. No, sir.

"MR. BRADLEY. Then, before it does adjourn, I desire to say, in the presence of this audience, that the statement you have read is false, from beginning to end."

Thus far the accuracy of this report is not denied, but the petitioner alleges that the controversy was continued, as follows:

"JUDGE FISHER. Crier, adjourn the court.

"THE CRIER. By order of the court it is now adjourned.

"MR. BRADLEY. Now I will say it.

"JUDGE FISHER. You can say what you like. If you wish to make a speech to the crowd you can do so.

"MR. BRADLEY. In the first place I say you have no right to expel me. The Supreme Court alone can do that.

"JUDGE FISHER, (leaving the room.) Very well. You can take an appeal."

It is not easy to discover how this continuation of the dialogue tends to qualify the character of the scene which preceded it.

It can hardly be doubted that this was a gross contempt of court, if there was a court sitting at the time, and justified expulsion, unless atoned for by an ample apology.

But no apology has ever been offered. On the contrary, the contempt has been defended, and its justification attempted even before this court.

One of the grounds of justification is, that the judge to whom the contempt was offered had no power to make the order of expulsion, which produced the act of contempt; and that, therefore, the contempt was *coram non judice*. But that does not follow. The question is not whether the judge had authority to make the order, but as to the contempt after the order had been made, and a contempt can never be *coram non judice* in open court.

The other ground of defense for this conduct is, that the act was not a contempt of the Supreme Court of the District of Columbia—

that court having, subsequently, taken up the subject, *de novo*, and removed the petitioner from its bar.

But at the time the contempt was given, Judge Fisher was holding a Supreme Court, and exercising its criminal jurisdiction as such Supreme Court. There is no criminal court in this district; there is, therefore, no judge of a criminal court in this district. The act of 3d March, 1863, abolished both the circuit and criminal courts of the District of Columbia, and transferred all their several powers and jurisdictions to the Supreme Court, created to take their place. It prescribes in what manner said Supreme Court shall exercise those powers and jurisdictions. One of the justices shall hold a criminal court; another a circuit court; a third the special term; and a fourth a district court. Or any one of the justices may at the same time hold two or more of these courts. But these several justices, when holding courts in this manner, have no authority or jurisdiction of their own, for the law has given them none. Their powers and jurisdiction are those of the "Supreme Court;" and these it is which make a court. The court, where the powers and jurisdiction of the Supreme Court of the District of Columbia are exercised, is that court. The Supreme Court of the District holds the criminal court, and the law makes one judge the court for that purpose.

The contempt in question was, therefore, a contempt of the authority of the Supreme Court. Otherwise no member of the bar could be dismissed for contempt of the authority of the court, unless such contempt was offered to the court in general term. Thus protected, any member might, if so disposed, (and this is by no means an extravagant supposition should the petitioner succeed in the present attempt,) walk round the courts, from one to another, denouncing the judges as liars, seriatim, and the court would be powerless to rid itself of his presence.

This conduct of Mr. Bradley, however, was not merely a contempt of the authority of the Supreme Court of this District, but was also gross misbehavior in his office of attorney, and for this reason, also, his offense was cognizable by the court in general term, irrespective of the doctrine of contempts.

It is true that the rule to show cause ordered against him by the court, in general term, ignored the order made by Judge Fisher, and called upon him to answer for the specified acts as a contempt; yet,

after his return was made, the court, as it had the right to do, considered his offense in both these aspects, and "Ordered: that, *for the causes set forth in said Rule*, the name of Mr. Bradley be stricken from the roll of Attorneys, Solicitors, &c., authorized to practise in this court."

The authority of the courts to expel a member from the bar, not merely for contempts offered in court, but for misbehavior as an attorney, so clearly announced in the case of Secombe, has, also, received the sanction of this court in the recent case of ex parte Garland, 4 Wallace, 379, where the court say: "In ex parte Secombe, a mandamus to the Supreme Court of the Territory of Minnesota, to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. We are not aware of any case, said the court, where a mandamus was issued to an inferior tribunal commanding it to reverse or annul its decision where the decision was, in its nature, a judicial act and within the scope of its jurisdiction and discretion. And in the same case the court observed that 'it has been well settled by the rules and practice of common law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and consellor, and for what cause he ought to be removed.'" The jurisdiction of the court in removing Mr. Bradley, besides, belonged to the court under an express statute of Maryland which is in force in this District.

By the Act of May, 1719, ch. 4, section 2, it is enacted: "That the several magistrates, judges of the several courts within this province, be, and are hereby authorized and strictly required to observe the demeanor of all practitioners of the law before them, as well as all ministerial officers, or other persons who shall use any indecent liberties to the lessening the grandeur and authority of their respective courts, and to discountenance and punish the same, according to the nature of the offense, either by suspending such practitioners of the law from their practice, perpetually, or for a time, or to punish such practitioners, or ministerial officers, or other persons, by fine, at the discretion of such court before whom such offense shall be committed, not exceeding four thousand pounds of tobacco in the superior courts, nor two thousand pounds of tobacco in the several county courts within this province, on each offender, for any one offense."

Whether viewed as a contempt or as misbehavior, therefore, the Supreme Court of the District of Columbia possessed exclusive jurisdiction to make the order removing Mr. Bradley from its bar, and that decision is beyond review.

2d. But there remains still to be examined another cause for the order of removal of Mr. Bradley, which did not take place in court.

Immediately after the court had adjourned on the 10th of August, the day of the scene above referred to, Mr. Bradley followed Judge Fisher into one of the street cars, and there, in person, handed him a note, of which the following is a copy:

"WASHINGTON, *August* 6, 1867.

"Hon. GEORGE P. FISHER—SIR: In the altercation which occurred between us when you returned to the court room after the adjournment, on the 2d of July last, you observed that you were sick and were then pleased to add "You know where to find me; and I hold myself responsible in every form for whatever I say or do," or words to that effect, after which you applied to me most opprobrious epithets. There is but one interpretation of such an intimation received among gentlemen. I told you I could wait; and am gratified to find that you have recovered, and that the trial of the then pending case being now closed, we are both at liberty.

"That no time may be unnecessarily lost, I beg you will let me know, as soon as you conveniently can, when it will suit you to meet me out of this District, that we may arrange, to our mutual satisfaction, the points of difference between us, without incurring the risk and odium which might accompany any controversy here, or in public.

"With the same view I hand you this note in person, and am, sir, your most obedient servant,

(Signed) "JOS. H. BRADLEY."

This note bears date the 6th of August and, of course, contains no reference to the occurrences in court on the 10th. The insult for which it demands, or seems to demand, redress, it states, was given by Judge Fisher in the court room on the 2d of July. It was, therefore, a deliberate act. If its object was to obtain satisfaction according to the acceptation of that term among "gentlemen," it was in violation of the act of Congress of 20th February, 1839,

which makes it a felony to send or receive, in this district, a challenge to fight a duel; and provides the same penalties for such as shall seek to evade its provisions, by making arrangements in the district, to give or receive such challenge out of the district.

One of the reasons given by Mr. Bradley in his answer for delivering this note is "*That it was not deemed advisable to seek those explanations, or that compromise and adjustment of private quarrels which too often result in a breach of the peace, in a jurisdiction where the parties might be made amenable to a criminal proceeding before the court of which one of the parties was a member.*" A breach of the peace out of the district was then one of the contingencies contemplated when the note was delivered.

But the same answer also says that the note "was not a challenge, nor meant, nor intended for one. It was precisely what has been stated, opening a way for an amicable settlement of a private controversy;" and in another place, that "his object and determination was to open the speediest way to that explanation *and retraction*, which every honorable man must be desirous to make when he becomes satisfied he has done an injury to another."

The misfortune is, however, that these amiable views were a secret in the writer's own bosom. On its face, the note, if not a perfected challenge, was plainly portentous of mischief, according to the manner of the duelist. It was the result of more than a month of deliberation. The resolution of its writer was, therefore, not to be shaken. Its language was reserved, lofty, punctilious, calm, determined. The mysteriousness of its intimations was something terrible.

Such was the face it presented to Judge Fisher. Its peaceful intentions were concealed from his sight; and these were, that it should open the way to "explanation and retraction;" and the judge was the party who was to be brought to "explanation and retraction." The terrors of the note were a pretense and a sham, intended only to operate on the judge's fears, and so to lead the way to peace.

And this, we doubt not, is a truthful explanation. Indeed, we have, ourselves, never regarded the note as an earnest transcript of its writer's intentions, and his disclaimer, though made *post litem motam*, may be taken for true, and the rather so when we recur to the fact of its long delay, and the ostentatious publicity of its de-

livery, by the hand of the writer himself—a kind of proceeding not allowed by the code amongst gentlemen who are serious in their pursuit of "satisfaction."

We respectfully submit, therefore, that the case of the petitioner has not been mended by these explanations and disavowals.

A court destitute of the power to protect its judges from such experiments as this, upon their fears, would soon be driven from its seat; or, if possessing the power, but too pusillanimous to use it, must sink into deserved contempt.

In thus shewing cause against the present rule, we have relied entirely on the facts in the record before the court, either stated or admitted by the petitioner himself, and on such authorities as we supposed would be most weighty in this tribunal.

The return, we admit, is argumentative, but it is a return in answer to a rule to shew cause, and we have only followed, in this respect, the precedent set by the judges of the Court of King's Bench in the great case of Bridgman *vs.* Holt et al., Show. Par. Cases, 111, in their return to an order of the House of Lords, quoted at length with enthusiastic approval by Mr. Justice Baldwin in ex parte Crane, 5 Peters, 212, &c.; that, also, of Judge Conkling, in ex parte Bradstreet, 7 Peters, 634; and that of the United States *vs.* Kendall, 5 Cranch, C. C. R., and in 12 Peters Rep., 527, where the return made by the respondent consisted of an exceedingly elaborate argument on questions of constitutional law, covering forty-three pages of printed matter.

D. K. CARTTER, *Chief Justice.*

GEORGE P. FISHER,
A. B. OLIN,
ANDREW WYLIE,
} *Justices.*

W. H. GAINES, *et. al.*

vs.

HON. JACOB THOMPSON, &c.

Supreme Court

U. S.

BRIEF OF APPELLANTS' COUNSEL.

The Bill in this case sets forth the equitable title of the Complainants as the heirs of Ludovicus Belding to the south west quarter of section 33, Township *two*, south of range 19 west, on which is situated the celebrated Hot Springs of Arkansas.

The facts are substantially those set forth in the case of *Hale, et al vs. Gaines, et al in* 22 *Howard* 160, in which case the superior title of these Complainants was vindicated as against the conflicting claims of private parties.

No opinion was expressed touching the claim of the United States, but that question was left open because the United States were not parties in that cause.

The character of this equitable title and the circumstances under which it arose, will fully appear in the allegations of the Bill and by Exhibits A, B & C.

By these exhibits it appears that the Complainants were allowed by the Secretary of the Interior by his order of 21 Nov., 1851, to enter this land under the acts of 29 May, 1830, and 14 July, 1832, to enable the Complainants to be "placed in a position to *contest* the *adverse* claims of others," and "*subject* to the same power of revision and control by the General Land Office and this Department, as may be lawfully exercised *over any ordinary entry*."

Record, page 6.

The object of the entry and its legal effect would seem therefore to be analagous to that made and sustained by this Court in

23 *How.* 85, 6, & 90.

By virtue of this order the Complainants made their entry and paid the purchase money in the proper Land Office on the 19 Dec., 1851.

Record 6 & 7.

Exhibit D shows the attempt in 1860, of the then Secretary of the Interior to cancel this entry after the property had been improved and great expenses incurred on the faith of the entry allowed to be made, as averred in the Bill.

Record 8, 9, &c.

This Bill was filed to obtain an injunction against the commission of the lawless act menaced by the Secretary of the Interior, and we maintain that in such a case an injunction against a public officer, is right and proper.

Mississippi vs. Johnson 4 *Simons' Rep.* 13. 6 Simons 223.
1 Wal. 498-9 6 *Paige's Reports*, 88.
6 Wall. 71-77 2 *Johns' Ch. Rep.* 473.
2 *Kent*, 339,—*Note.*

Such a bill is proper to prevent a cloud being cast on a title, or to prevent the injurious act of a public officer.

3 *How.*, ~~103.~~ 460-1-3
~~17 Wendell, 327.~~

I.—Congress has exclusive power to declare how lands of the U. S. shall be disposed of.

U. S. vs. Gratiot. 14 *Pet.* 526.

And to enforce rights acquired by the citizen under the acts of Congress is the clear duty of the judiciary, whose jurisdiction is commensurate with every right or duty derived under the Constitution and Laws of the Uuited States.

Irvine vs. Marshall. 20 *How.* 564.

The practice of or opinion of the Land Office cannot control the action or opinion of the Court in expounding the rights of parties claiming under the law.

20 *How., page* 567.
24 *How., page* 361.

Lindsey vs. Hawes. 2 Bl. 554-6.

A pre-emption certificate confers an equitable right which Courts will protect. It is not a "shadowy right."

Lytle vs. Arkansas. 9 How. 333.
15 *Pet.* 407. 3 *How.* 441.

Our title is clear to the benefit secured to pre-emptioners under the act of 29 May, 1830.

4th *Stat. at Large*, 420.

The act of 14 July, 1832, extends the benefits of the first act.

4 *Stat.* 603.

The supposed reservation of the Hot Springs is by act of April 20, 1832.

4 *Statutes*, 505.

This very act of 29 May, 1830, (4 *Stat.* 420,) extended by 14 July, 1832, (4 *Stat.* 603,) was before this Court in several cases.

In *Brown vs. Clements*, 3 *How.* 666, "this Court held that the claim of the pre-emptioner under the act of 29 May, 1830, could only be defeated by a failure to comply with its provisions, *within one year*, and that during that time it was only liable to *public sale* under the proclamation of the President, and such sale could be prevented by the pre-emptioner paying for the land as directed by the act."

Our Bill which is to be taken on this appeal to be true charges that Ludovicus Belding could not comply with the conditions of the act of 29 May, 1830, and enter the land in *one year*, because this land had not been surveyed and certified, &c. until 30 April, 1838.

Record, page 2.

Undoubtedly his right would have expired with the act of 29 May, 1830, but for the saving terms of the act of 14 July, 1832.

4 *Stat.* 603.

"This last act fully recognises the equitable claims of the pre-emptioners who could not obtain the benefits of the act of 29 May, 1830, because of the failure of the Government to survey the *lands* occupied by the meritorious settlers, and proceeds to extend the benefits of the original act to the occupants on the same conditions in every respect as are prescribed in the said act (29 May, 1830,) within *one year* after the surveys are made, &c." And this benefit is expressly *extended* "*to all* the occupants and settlers who are entitled to a pre-emption according to the act of 29 May, 1830."

The plain import of this act is to place the pre-emptioner in the same position as if "the original act had allowed him one year after the survey was made and returned to make his proof and entry."

Lytle vs. Arkansas. 9 *How.* 333, 335.

The Bill then alleges that within the limit of the act of 14 July, 1832, the heirs of Belding made proof of his settlement, &c., satisfactory to the Register and Receiver according to the rules of the General Land Office, and at the same, viz: 10 March, 1839, a tender was made to the proper Land Officer of $200 in gold and silver.

And that on 25 Nov., 1851, the Commissioner of Land Office in pursuance of instructions from the Secretary of the Interior, directed that the Complainants should be allowed to enter said lands, and in pursuance thereof on 19 Dec., 1851, they made the entry and paid *the money*.

Record, page 2, 3.

The case of *Lytle vs. Arkansas*, 9 *Howard, p.* 334, is precisely analogous to the present.

In that case after the expiration of the act of 29 May, 1830, Congress granted 1000 acres to the state to be selected by the Governor.

See act of 15 *June*, 1832.
4 *Statutes*, 531.

But this Court held that by effect of the subsequent act of 14 July, 1832, and the failure of the Governor to select prior to its passage, the original rights of the pre-emptioner were restored and protected against a location made in 1833, under the act of 15 June, 1332, and this Court declared the rights of the pre-emptioner under the two acts of 1830, and 14 July, 1832, to be *vested rights.*

9 *How.* 335.

Our case is stronger than that of *Lytle vs. Arkansas,* because there the Land Officers illegally refused the entry to be made upon the proof establishing the right, while in our case, the proof was made within the time allowed by the act of 14 July, 1832, and the entry was made by the express orders of the Secretary of the Interior.

The case in 9 *Howard, p.* 333, decides that the receipt of the purchase money by the Government, (as is our case,) is a waiver of objections, as to the mode of taking the proof."

And it also decides that having paid the money and offered to make the entry, the claimants were to be considered in the same light as if they had been permitted to make the entry.

9 *Howard, page* 333.

And the same case establishes that the payment and entry may be made by the *heirs of the pre-emptioner.*

We maintain therefore that the attempt of the Secretary of the Interior in 1860, to cancel this entry is illegal and can prejudice no right of these Complainants.

Brown vs. Clements. 3 *Howard,* 667–8

Nor could the Secretary of the Interior of 1860, annul the action of his predecessor in 1851; followed as it has been by possession and improvements as alleged in the Bill.

Tate vs. Carny. 24 *How.,* 362.

But it is said that the act of 20 *April*, 1832, sec. 3, reserved the Hot Springs for the future disposal of the United States, and prohibited "their entry for any other purpose whatever."

4 *Stat.* 505.

We admit that these Springs could not be *entered* but for the effect of the subsequent act of 14 *July*, 1832.

This subsequent law manifestly relates back to and protects *every right* which was intended to be protected by the prior act of 29 May, 1830.

It was surely competent for Congress to *retroact* by its legislation in behalf of a favored class of occupants, who could not get the benefits of the act of 29 May, 1830, because the survey had not been returned. Such retrospective legislation is valid as against the Government itself, and effectually carries back the rights of Belding to the date of the act of 29 *May*, 1830.

Congress has thus by its subsequent and final legislation, declared in favor of *every* pre-emptive right *vested* under the act of 29 May, 1830, and placed "all occupants" who made proof and *entry under* the act of 14 July, 1832, on the same favored ground as if they had perfected their title under the act of 29 May, 1830.

If therefore the Hot Springs was on 14 July, 1832, subject to the pre-emptive claim of Belding, as a settler thereon, who was intended to be benefited by the act of 29 May, 1830, Congress intended that *he* as well as every other settler, should date his rights as against the Government from 1829, and not 14 July, 1832.

The reservation in the act of 15 April, 1832, is for "*the future disposal*" of the Government, and the disposition has been subsequently made by the act of 14 July, 1832, which *donates the Hot Springs* to the man who had settled on it in 1829, and who would have secured the title thereto under the act of 29 May, 1830, but for the omission of the Government to make its surveys.

Belding was therefor entitled to make his entry according to both the letter and spirit of the act of 14 *July*, 1832, *non obstante*, the prior act of 15 April, 1832.

Delauviene vs. Emisan. 15 *Howard* 538.

The payment of the purchase money binds the Government, and the certificate of the *entry made* can *no more* be *cancelled* than a patent.

Carroll vs. Safford. 3 *How.* 460.

The same case decides that the lands are taxable by the states after the equitable title has been acquired, although not patented.

3 *How.* 460–1.

The Secretary of Interior after the decision by Register and Receiver upon the facts, ordered the entry to be allowed, and it was done, the money paid, and ejectment brought for the land. The Secretary now orders the entry to be cancelled, *ex mere motu*.

The Executive Officers and the Land Department cannot violate law—and it is their duty to respect the decisions of the Courts U. S.

20 *How.* 567.
10 *Pet.* 80.

Courts will overrule them.

20 *How.* 8.

The entry certificate conferred a legal right—vested a right.

18 *How.* 45.
9 *How.* 333.

And can only be cancelled for fraud or some unfairness.

22 *How.* 193.
3 *How.* 460.
Lytle's case (2*d time*) 22 *How.* 203.

And this only by a *judicial* proceeding—the entry is only voidable, not void.

Opinion of Atty. General Butler, 21 *June*, 1836.—*Land Laws, vol.* 2,—97.

One Secretary cannot reverse the decision of another, after rights have vested, especially where he has acted judicially, expounding laws, &c. Courts of the U. S. expound laws imposing duties on heads of Departments.

Decatur vs. Paulding. 14 *Pet.* 497.

Register and Receiver act in a judicial way, and their decision within the scope of their powers is final.

Opinions of Att. General, pages 1027, 1412.
9 *Howard*, 333.

But *all* the authorities of Government, Register, Receiver, Commissioner of Land Office and Secretary of Interior, concurred in issuing the certificate to Belding's *heirs.*

His occupation and settlement which are the *consideration* for the grant of the Land, was proved, and in due time, but no survey being made he could not locate. This fault of Government cannot injure his rights.

9 *How.* 333.

And such has been the long established rule and practice of the Land Office.

See vol. of Instructions and Opinions, Land Laws, page 639, *case of Spiers.*

"The rule is laid down that when an individual entitled to pre-emption has done all as far as he was able, and was prevented by some circumstance on the part of Government from completing his entry, the rule is to admit his claim, though the law has expired."

That a reservation cannot prevail against a pre-emption right,

See Wilcox vs. Jackson, 13 *Pet.* 511.
U. S. vs. Fitzgerald, 15 *Pet.* 407.
Lytle's case, 9 *Howard*, 334.
Barnard vs. Ashley, 18 *How.* 45.

If the Government had disposed of the Land to another, it *might* alter the question—here, the U. S. yet holds the Lands, and the Supreme Court has decided ours to be the *best title* against all the world except the U. S.

The settlement established *the right* to a patent which gave a perfect legal title, and went back by relation to the origin of the claim.

Sanders vs. Brant, 10 *How.* 348.

The Commissioner of Land Office may correct errors, he is clothed with liberal powers to be exercised for the *purposes of justice*.

Bell vs. Hearne, 19 *How.* 262.

J. L. Brent.

H. MAY,
R. J. BRENT,
For Appellant.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

WILLIAM H. GAINES *et al.*, appellants,
vs.
JACOB THOMPSON AND JOSEPH S. WILSON appellees.

No. 1.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF OF UNITED STATES.

WM. M. EVARTS,
Attorney General.

J. HUBLEY ASHTON,
Asst. Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

WILLIAM H. GAINES *et al.*, appellants,

vs.

JACOB THOMPSON and JOSEPH S. WILSON, appellees.

No. 1.

Appeal from the Circuit Court of the United States for the District of Columbia.

STATEMENT AND POINTS OF UNITED STATES.

This is an appeal from a decree of the late Circuit Court for the District of Columbia, dismissing a bill filed by the appellants against the SECRETARY OF THE INTERIOR and the COMMISSIONER OF THE GENERAL LAND OFFICE, praying that those officers be enjoined from causing or permitting an entry, by the appellants, of a quarter section of land in Arkansas, containing the "Hot Springs," to be cancelled.

The entry had been allowed on November 21, 1851, by Mr. Secretary Stuart, for the purpose of enabling the appellants to contest the adverse claims of others to the same land. (Rec. p. 6.)

Such contest was had, (Rec. p. 9;) and on June 7, 1860, Mr. Secretary Thompson directed, in a letter to the Commissioner of the General Land Office, that the entry should be cancelled. (Rec., p. 10.)

A plea to the jurisdiction of the court was filed by the Commissioner of the Land Office. (Rec., p. 11.) The court sustained the plea and dismissed the bill.

FIRST POINT.

The subject-matter of this bill is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties.

I. THE SUBJECT-MATTER IS OF EXECUTIVE COGNIZANCE.

1. Until the establishment of the Interior or Home Department, the land matters of the Government were managed and controlled by the Executive Department, called the Treasury Department; and, by the different acts regulating that department, all such matters as are involved here were entrusted exclusively to the head of that department in the last resort, whose decisions and action should be final and not reviewable by any other branch of the Government.

1. Stats. at Large, 65, 279.
2. Ibid, 279, note a, 535.
3. Ibid, 366, 487, 567, 688.

By the act of April 25, 1812, (2 Stats., 716,) a General Land Office was created in the Treasury Department, with a chief officer styled the Commissioner of the General Land Office.

Under this last act, all questions of the character here presented, as well as all such acts and things touching and respecting the public lands as before then were performed by different officers of the Government, were to be decided, executed and performed by the Commissioner of the General Land Office, under the direction of the Treasury Department.

2. The act of July 4, 1836, section 1, (5 Stats. 107,) provided as follows :

"The executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands, *or in anywise respecting such public lands*, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

Barnard's heirs *vs.* Ashley's heirs, 18 How. 45.

The effect of this act was determined by Attorney General Butler, who held that it did not repeal the clause of the act of 1812, (before mentioned,) which made the General Land Office a branch of the Treasury Department, and subjected it to the general superintendence of the President, through the Secretary of the Treasury. (3 Opinions, 138.)

3. Subsequently, by the act of March 3, 1849, section 3, (9 Stats., 395,) the Secretary of the Interior was required to discharge the duties of supervision and appeal, pertaining to the General Land Office, previously discharged by the Secretary of the Treasury.

Upon this act the court has held that the jurisdiction of the Secretary of the Interior to revise on appeal is co-extensive with the power of the Commissioner to adjudge, and that power reaches, includes, and embraces all matters "in any wise respecting the public lands." (Act 1836.)

Magwire *v.* Tyler, 1 Black, 202.

4. Besides and beyond these general duties prescribed by the foregoing acts, by several other statutes passed at different times, this power of review and correction was expressly given to the department having control and disposal of the public lands.

3 Stats. at Large, 526.
4 Ibid 31, 301, 398, 702.
5 Ibid 73, 472, 673.

5. The Interior Department is named and styled, by the law creating it, an Executive Department; it is a portion of the executive branch of the National Government.

It thus appears that the Commissioner of the General Land Office is under the direction and control of the Secretary of the Interior, and the Secretary is under that of the President, the Chief Executive.

II. THE SUBJECT-MATTER IS ONE IN WHICH JUDGMENT AND DISCRETION ARE TO BE EXERCISED.

This, the second branch of the first proposition of the argument, is self-evident upon a review of the duty and authority conferred upon the officers of the Land Department by the several statutes just enumerated.

The learned Chief Justice, in State of Mississippi *vs.* Johnson, (4 Wall, 498,) says: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

Within the entire range of the executive authority there are no functions less ministerial, and more distinctively *executive* in their character, than those which devolve upon the officers of the Land Department in the administration of matters relating to the disposal of the public domain.

They have not merely the *right*, but the *duty*, of judgment and decision in those matters; and they are directly responsible in determining the questions of fact and of law which arise before them only to the authority, within their own department of the public service, upon whom an appellate and supervisory jurisdiction has been conferred by statute.

The judgments of registers and receivers on questions of right of pre-emption, and entry, are subject to review by the Commissioner of the Land Office, (Barnard's Heirs *v.* Ashley's Heirs, 18 How., 45.) And over all the judgments of that officer a revisory jurisdiction is exercisable by the Secretary of the Interior. (Magwire *v.* Tyler, 1 Black, 202.)

The elements of fact and law upon which the judgments of these officers are predicated must necessarily be determinable by themselves without judicial interference or obstruction, otherwise, the system of responsibility and subordination which the Legislature, in its plenary power over the subject, has established, would be impaired or destroyed.

To interpose its authority in a scheme of administration from which Congress has carefully excluded it, would be simply usurpation on the part of the Judiciary.

SECOND POINT.

The case is therefore within the rule which forbids judicial interference with the exercise of executive discretion.

This principle has been so lately expounded by this court, and so ably vindicated by the Chief Justice, in the case of MISSISSIPPI *vs.* JOHNSON, (4 Wall, 499,) that we deem it unnecessary to do more than refer to the other and previous adjudications of this court, and to leading opinions of the Attorney Generals of the United States.

Kendall *v.* U. S., 12 Pet., 609.
Decatur *v.* Paulding, 14 Ib., 515.
Kendall *v.* Stokes, 3 How., 98.
Brashear *v.* Mason, 6 Ib., 101.
Reeside *v.* Walker, 11 Ib., 289.

U. S. *v.* Guthrie, 17 Ib., 304.
1 Opinions Att'ys Gen'l, 681.
3 Ibid., 681.

And there is nothing in this case which brings it at all within the decision of this Court in the case of Marbury *vs.* Madison, 1 Cranch, 137.

The independence of the different branches of the Government, and the freedom of each, from interference by the others, so necessary to the safety of the govermental structure, can never be maintained without strict adherence to the principles of these adjudications.

THIRD POINT.

All the cases cited by the appellants in which the courts have undertaken to review ultimately the decisions and action of the Land Office, in the exercise of its statutory authority, were cases between *private parties, litigated after the legal title had passed, by patent or otherwise, out of the Government.*

There are many such cases in the books; some of them are cited by the appellants; others may be here mentioned.

The Court, very properly in those cases, examined the facts, in order to ascertain which party had the better right.

LYTLE *v.* ARKANSAS, 9 How., 329. 22 How., 202.

In this case, a patent had issued to the Territory of Arkansas, and the bill was brought to enforce the alleged equity of a party claiming a right of pre-emption in the same land.

CUNNINGHAM *v.* ASHLEY, 14 How., 382.

In this case, also, the contest was between a party who held the legal title and one who set up a paramount equity under the pre-emption laws.

BARNARD'S HEIRS *v.* ASHLEY'S HEIRS, 18 HOW., 43.

This was a proceeding to quiet title between two patentees of the same land.

GARLAND *v.* WYNN, 20 HOW., 7.

In this case a patent had issued to the defendant, and the plaintiff claimed a right to the legal title by virtue of his superior equity, which had been defeated before the land officers by the fraudulent contrivance of the defendant.

O'BRIEN *v.* PERRY, 1 BLACK, 139.

This was an action by patentee to recover possession, and the court sustained a prior equitable title in bar of the suit.

HARKNESS *v.* UNDERHILL, 1 BLACK, 316.

This was a bill for conveyance by a patentee of the legal title, at the instance of a party claiming under an entry set aside at the Land Office.

LINDSEY *v.* HAWES, 2 BLACK, 557.

In this case the court held that a patent had been wrongfully issued, and decreed a conveyance of the legal title by the patentee to a party having a better pre-emption right.

MINNESOTA *v.* BACHELDER, 1 WALL, 115.

In this case, upon the authority of the previous decisions, the court review the action of the land officers in issuing patents for lands claimed by the State of Minnesota, under the act admitting her into the Union.

The propriety of these decisions it is not desired to impugn. In all of the cases, it will be seen, the legal title had passed out of the United States; and the general question in all of them was, to whom that title equitably belonged. This question was a judicial one in the strictest sense, and as agitated between competent parties, subject to the jurisdiction of the court, the court might well pronounce upon it in whatever form presented, whether at law or in equity, and adjudge the rights of the parties in respect to the subject-matter of the controversy in each case. There is no warrant in the adjudications or *dicta* in these cases, for the exercise of any such jurisdiction as is invoked by the complainant in this bill.

If the legal title of the property in question should ever pass from the United States, the complainants might well raise the question of their alleged paramount equity in some judicial way, under the precedents in the cases just cited, and obtain a judicial determination of their rights; but until that occurs, we apprehend the courts cannot, without the consent of the United States, review the decision and action of the Land Office upon this title.

FOURTH POINT.

But suppose the court should grant the injunction; what advantage would accrue to the appellants?

It will not be pretended, we presume, that a bill would lie to compel the issuance of a *patent*.

The President signs all patents.

Act April 25, 1812; sec. 8.

The President cannot be compelled by judicial decree to do any executive act.

Mississippi *v.* Johnson, 4 Wall, 499.

The legal title would continue to be vested in the United States, and as against such title the equitable

right of the appellants, conferred by the entry, could never prevail.

Wilcox *v.* Jackson, 13 Pet., 516.

In that case the question was distinctly raised and decided by this court, whether a person holding a register's certificate without a patent could recover as against the United States. The negative was held.

Irvine *v.* Marshall, 20 How., 566.

The entry allowed under the special order of Mr. Secretary Stuart, of Nov. 21, 1851, has served every purpose of the appellants to which it can be applied. It prevailed as against the opposing claims of Rector and the heirs of Perciful.

Hale *v.* Gaines, 22 How., 144.

The only remaining title is that of the United States; which the complainants can never be in a position to contest without a patent, and this they can never get so long as the opinion is held, by the Executive Department, that the act of April 20, 1832, forbade the entry and appropriation of this tract under the land law of the United States.

That question as to the construction and effect of the act of April 20, 1832, has been again raised, since this bill was filed, by the heirs of Belding; and on full consideration Attorney General Bates held that they were not entitled to a patent.

10 Opinions, 56.

FIFTH POINT.

In the brief of the appellants we find this admission: "We maintain, therefore, that the attempt of the Secretary of the Interior in 1860, to cancel this entry, is illegal, *and can prejudice no right of these complainants.*"—(Brief, p. 5.)

Why, then, complain of the cancellation of the entry?

If the act of the Secretary of the Interior is void—of no legal effect—and the rights of the complainants are not prejudiced, the very ground of equitable relief, predicated in the bill, does not exist according to the express admission of the complainants.

SIXTH POINT.

This argument goes, of course, only to the action of the Department, and does not pretend to deny to appellants the right to assert or defend their claim in a proper suit in the courts between proper parties, and to have the courts pass on the same, even as against the final decision of the department; but we contend that no Executive Department can be interfered with or controlled in the manner here sought; and that is all the plea here insists upon.

The judgment of the court below should, therefore, be affirmed.

WM. M. EVARTS,
Attorney General.
J. HUBLEY ASHTON,
Asst. Attorney General.

○